CompTel

September 9, 2005

Marlene Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: WC Docket No. 04-223: Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area

Dear Ms. Dortch:

CompTel understands that the Commission is considering action in the above-captioned proceeding that would materially grant the petition of Qwest Corporation (Qwest) for forbearance from sections 251(c) and 271 of the Communications Act, as amended, and eliminate dominant carrier regulation, in the Omaha, Nebraska metropolitan statistical area (MSA).[1] The requested relief has broad implications for local competition, the existing wholesale access market, and the unbundled network element (UNE) regime that fundamentally underpins both, as it would define conditions under which competitive local exchange carriers (CLECs) would be immediately denied access to UNEs, including UNE loops. As CompTel explains below, forbearance from section 251 and 271 obligations based upon the level of retail competition in a specific market would be contrary to precedent and prior findings, unsupported by and inconsistent with the data contained in the record, and overwhelmingly detrimental to both competition and consumers.

Qwest's request for relief from section 251/271 regulation is fundamentally flawed. Qwest's petition basically asks the Commission to look at an apple, when it should be looking at an orange, and produce a lemon. The "apple" Qwest would have the Commission look at is the level of competition in retail telecommunications markets, when the "orange" the Commission should be looking at is the market for critical wholesale inputs to retail services. The Commission has repeatedly found that access to these inputs as UNEs under sections 251 and 271, particularly UNE

[1] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223 (June 21, 2004) ("*Qwest Petition*").

loops and transport, is critical to competition. Even Qwest acknowledges that much of the retail competition it relies upon in its request for relief is currently based on the use of UNEs. The Commission has further found that "commercial" offerings of these inputs, in the form of special access services, do not suffice to support robust retail competition. Lastly, the Commission has expressly rejected consideration of the level of retail competition as the predicate for denial of access to UNEs in its *Triennial Review* proceedings.

In the face of these prior findings, the Commission simply cannot reach the conclusions required under Section 10 of the Communications Act ("Act") in order to forbear from Section 251 and 271 requirements in the Omaha market based upon the slim record before it. Specifically, the Commission cannot find that continued availability of UNEs is not necessary to ensure that the charges and terms associated with wholesale inputs critical to retail competition shall remain "just and reasonable" or that this relief will serve the public interest. Nor can the Commission find that this relief will "promote competitive market conditions" or "enhance competition among providers of telecommunications services." [2]

In contrast to the Commission's deregulatory decisions with respect to new fiber and fiber to the curb facilities, grant of Qwest's petition cannot be defended on the grounds that it will spur pro-competitive investment in new facilities. Having already granted broad fiber and broadband unbundling relief to Qwest, the Commission by definition here considers only Qwest's obligation to unbundle existing, legacy telecommunications facilities. There is no linkage between deregulation of these existing facilities and new investment. To the contrary, as set forth below and elsewhere in the record, a grant of Qwest's petition would dramatically undermine the incentives of competitive carriers to invest in new facilities, and eliminate the very source of much of the retail competition that Qwest cites as the basis for relief.

In considering Qwest's petition, the Commission should also be cognizant of the overriding need for stability in its regulatory regime and in the telecommunications marketplace. After the extraordinary regulatory upheavals of the last several years, the Commission has just completed a comprehensive consideration of unbundling requirements in its *Triennial Review Remand* proceeding. This has ushered in a period of relative stability and a clear set of ground rules for competition between CLECs and incumbent local exchange carriers ("ILECs") going forward. This stability is reflected in both renewed investment in and by competitive carriers and announcements of investment in new broadband facilities by ILECs. CompTel respectfully submits that the Commission should not immediately eliminate this stability by an ad hoc, market-specific decision that is certain to provoke a wave of "me too" requests across the country. The unbundling

[2] *See* 47 U.S.C. § 160 (b).

regime adopted just months ago by the Commission is not broken, and it does not need to be "fixed" on a market-by-market basis.

Qwest's request for forbearance from section 251 and 271 requirements should therefore be denied. To the extent that Qwest is entitled to any relief due to the level of retail competition in Omaha, such relief is best focused on a proper consideration of whether Qwest remains a "dominant carrier" in Omaha. And to the extent that the Commission concludes that Qwest is no longer a dominant carrier in Omaha, the Commission can directly address regulation (or deregulation) of Qwest's retail offerings in the marketplace. Deregulation of retail services should be the limited issue here, taking care to avoid anticompetitive effects on the wholesale market for vital competitive inputs such as UNEs, interconnection, and collocation.

Granting Qwest's petition would run afoul of the Commission's prior impairment analyses and related findings.

Qwest seeks forbearance from section 251 and 271 regulation based upon claims of flourishing retail competition in the Omaha MSA.[3] Any grant of forbearance on that basis, however, would run directly afoul of recent Commission impairment analyses and related findings and disrupt the relative regulatory and economic stability currently experienced in the industry. Furthermore, reliance on retail competition ignores completely the vital competitive and market realities in the market for *wholesale* access to critical inputs to competitive retail offerings as UNEs (most notably last-mile loops and transport).

The Commission very recently completed a comprehensive consideration of section 251 and 271 requirements. With regard to DS0 loops and interoffice transport, in the *Triennial Review Order*, the Commission unequivocally determined that copper and hybrid loops should be unbundled due to "the steep economic barriers associated with alternative loop deployment that are compounded by various identified operational issues."[4] Even more recently, in the *Triennial Review Remand Order*, the Commission found impairment and required unbundling for high-capacity loops and dedicated interoffice transport in many circumstances.[5] In doing so, the Commission expressly rejected invitations to make impairment determinations on an MSA basis (as Qwest's petition requests) because

[3] *See* Qwest Petition at 6 ("the relevant product market for which Qwest is seeking forbearance is the market for services provided under Section 251(c) and selected services under Section 271 . . . due to the mass market residential services and business services, local exchange and exchange access services offered by full facility-based CATV providers (as CLECs) and CMRS providers.").

[4] TRO ¶ 199. *See also id.*¶ 249 ("With more than 6 million kilometers of copper cable deployed, it is clear that copper remains the predominant loop type serving the mass market and no party seriously asserts that stand-alone copper loops should not be unbundled in order to provide services to the mass market.").

[5] *See* TRRO ¶ 5 (finding impairment for DS1-capacity loops at any location within the service area of an ILEC wire center containing fewer than 60,000 business lines or fewer than four fiber-based collocators, finding impairment for DS3-capacity loops at any location within the service area of an ILEC wire center containing fewer than 38,000 business lines or fewer than four fiber-based collocators, finding impairment for DS1 interoffice transport except on routes connecting a pair of wire centers where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines, and finding impairment for DS3 or dark fiber transport except on routes connecting a pair of wire centers that contain at least three fiber-based collocators or at least 24,000 business lines).

doing so would "require an inappropriate level of abstraction, lumping together areas in which the prospects for competitive entry are widely disparate."[6]

Having made findings that competitive entry is impaired without access to loops and transport as crucial wholesale inputs to retail competition, the Commission cannot simply reverse course and decide to eliminate mandated access to these inputs because some threshold of retail competition exists in the marketplace. The Commission expressly recognized the error in such an analysis in the *Triennial Review Order*. There, the Commission found that it would be unwise to base unbundling decisions on the level of retail competition, for reasons directly applicable here.[7] First, the Commission noted that doing so would compromise "Congress's other goals, such as investment in new facilities."[8] The Commission thus recognized that its unbundling decisions also implicate the incentives of CLECs to invest in facilities which incorporate limited UNEs as inputs to retail offerings. As argued below, removal of UNE access solely based upon the level of retail competition would dramatically undermine CLEC incentives to invest. Second, the Commission observed that the "relationship between retail competition and unbundling is complex. In many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs; thus, a standard that takes away UNEs when a retail competition threshold has been met could be circular."[9] Having concluded in the *Triennial Review Remand Order* that retail market share of the incumbent is not relevant to the impairment analysis, it is impossible to see how the Commission could reverse that conclusion here without acting in an arbitrary and capricious manner.

But Qwest's petition engages in precisely this kind of circular reasoning. Qwest makes much of retail competition from competitors who use UNEs (including competition based upon the use of UNE-P, which has since been phased out), and draws the remarkable conclusion that this competition warrants forbearance from unbundling requirements.[10] But as set out in greater detail below, the Commission

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[6] *Id.* ¶ 155.

[7] *See* TRO ¶114.

[8] *Id.*

[9] *Id.* *See also* TRRO at ¶ 39 n.116 ("Nevertheless, we do not believe that competition based on use of the incumbent's facilities, including competition based on UNEs, would constitute a sufficient basis for findings precluding access to UNEs for provision of service to the local exchange market.").

[10] Cox has made clear that it relies on provisions of section 251 – including, but not limited to, section 251(c)(3) (unbundled network elements), 251(c)(2) (interconnection) and section 251(c)(6) (collocation) – to provide service to its end users. *See* Letter from J.G. Harrington, Counsel, Cox Communications, to Marlene Dortch, Secretary, FCC, dated August 12, 2005, WCB Docket No. 04-223, at 3. Congress required incumbent carriers like Qwest to provide access to collocation for either "interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Similarly,

can only grant forbearance relief after considering whether relief will "promote competitive market conditions" or "enhance competition among providers of telecommunications services." [11]

The evidence in the record in no way supports the conclusion that removal of the very unbundling requirements that have, in substantial part, created retail competition in Omaha, will somehow enhance competition. In order to reach this conclusion, the Commission must engage in a far more nuanced analysis of the availability of wholesale inputs capable of supporting retail competition, as well as a searching analysis of specific retail markets which depend on these wholesale inputs. Qwest's petition, and the evidence it has submitted, utterly fails even the most minimal scrutiny on both counts.

First, with respect to the wholesale market for critical loop and transport inputs to retail services, the Commission's *Triennial Review Order* and *Triennial Review Remand Order* findings make clear that competitive carriers in Omaha cannot self deploy these inputs except in defined circumstances which do not remotely approach coverage of the entire Omaha MSA.[12] In the face of substantial evidence and prior Commission findings to the contrary, Qwest has adduced no evidence that the intermodal competition it relies upon fills this gaping hole in the market. In the *Triennial Review Order*, the Commission recognized that

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Congress required incumbent carriers to provide interconnection "for the transmission and routing of telephone exchange service and exchange access," including such services provided by competing carriers via UNEs. 47 U.S.C. § 251(c)(2). The record demonstrates conclusively that the providers cited by Qwest as retail competitors – including the largest, Cox – rely on access to UNEs, interconnection and collocation. It is thus impossible for the Commission to conclude that the statutory forbearance test is met for any of these provisions. It would be equally bizarre for the Commission to forbear from section 251(c)(3) but not sections 251(c)(2) and 251(c)(6), given that both of those latter statutory provisions are used by competitive carriers to access and utilize UNEs.

[11] *See* 47 U.S.C. § 160 (b).

[12] Qwest's post-Triennial Review Remand Order implementation of the Commission's loop and transport tests make this point clear. In Omaha, according to Qwest's own data, there is only a single central office (OMAHNENW) that meets the Commission's threshold for sufficient competitive entry to eliminate unbundling – in this case, the tier one threshold for interoffice transport. *See* Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Thomas Navin, Chief, Wireline Competition Bureau, FCC, dated July 8, 2005, WCB Docket Nos. 01-338, 04-313, at Attachment A. Put another way, only a single central office in Omaha offers any indicia of competitive entry, such that new entrants might (according to the Commission) have an alternative means other than Qwest UNEs of accessing end users. Because the Commission developed its loop and transport tests pursuant to the statutorily mandated impairment test of section 251(c)(3) (at least according to the Commission), it is impossible to see how the Commission could now conclude, based on the same retail market assertions by Qwest that the Commission expressly rejected in the TRRO, that carriers outside of that single central office in Omaha could access end users without UNEs.

intermodal alternatives do not alleviate lack of competition in wholesale markets,[13] and further noted that intermodal competition had not resulted in the availability of wholesale local loop offerings that might substitute for access to incumbent loop facilities.[14] The *Triennial Review Remand Order* also acknowledged that "no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market."[15] Qwest's comments in the SBC/AT&T and Verizon/MCI merger proceedings provide telling support for the Commission's *Triennial Review Order* observations. In the merger proceedings, Qwest has argued for the imposition of regulatory conditions (including various access and wholesale pricing conditions) on the grounds that competition in the market for critical wholesale inputs would be substantially worsened by the mergers.[16]

Qwest tries to avoid this issue by focusing on potential competitive access to switching facilities.[17] Without access to loops and transport inputs, however, switches are essentially useless. Qwest further relies on totally unfounded claims that its deregulation will somehow spur intermodal competitors to open their networks.[18] There is simply no evidence to support these assertions and ample evidence to the contrary. Lastly, Qwest suggests that, in the absence of UNE access, it will nonetheless offer "commercial terms" to CLECs.[19] While Qwest's few existing commercial deals are laudable, reliance on unilateral assurances by incumbents, in the absence of competitive checks in the wholesale market, was categorically rejected by the Commission in the *Triennial Review Remand Order*.[20]

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[13] *See* TRO ¶ 98 (noting that "differences between intermodal alternatives and traditional wireline deployments may reduce the weight [given] to the deployment of alternatives. . . . We may give less weight to intermodal alternatives that do not contribute to the creation of a wholesale market in accessing the customer or do not provide evidence that self-deployment of such access is possible to other entrants.").

[14] *Id.* ¶222. *See also* ¶ 245 ("Neither wireless nor cable has blossomed into a full substitute for wireline telephony. In addition, because wireless does not yet demonstrate the technical characteristics necessary to provide broadband services, unbundling incumbent LEC legacy loops is necessary for mass market consumers to realize the benefits of competition both for narrowband and broadband services, as well as both combined as a bundle.").

[15] *Id.* ¶ 233.

[16] *See* Qwest ex parte in WD Docket No. 05-75 at 13 (May 18, 2005).

[17] *See* Qwest Petition at 13, 16.

[18] *See Id.* at 25-26.

[19] *See Id.* at 26.

[20] *See* TRRO ¶¶ 46-55 (discussing the need to retain unbundling despite the availability of tariffed special access services).

With respect to retail markets, Qwest's evidence of "robust" competition in Omaha is sorely lacking. As noted above, the static view it presents with current retail market share data is misleading and largely irrelevant because the major competitors (including Cox) rely, to varying degrees, on Section 251 access.[21] The Commission must thus determine what level of retail competition will be lost without UNE access, what the effect of reduced competition in the wholesale market will be, and where it will find some level of "enhanced competition" that overbalances both effects. There is simply no hard evidence in the record that could support any rigorous analysis of these factors.

Qwest's broad brush approach also entirely ignores the market for business services. While removal of unbundling requirements across the board would directly impact these markets, Qwest provides virtually no record evidence to support forbearance with respect to these markets. In fact, Qwest's own admissions elsewhere suggest that competitive entry has not occurred in business markets in Omaha. In the *Triennial Review Remand Order*, the Commission established unbundling requirements based in part on the number of business lines in a given wire center. In Nebraska, Qwest has not claimed non-impairment for any of its high-capacity loop facilities, and indeed it has only designated one Omaha wire center for purposes of related transport deregulation.[22]

Qwest's primary reliance on cable telephony intermodal competition by Cox is also unavailing with respect to business markets. Here again, as the Commission recognized in the TRRO, intermodal competition is almost nonexistent in these markets. In its reply comments in the *Triennial Review Remand* proceeding (which were filed after its forbearance petition) Qwest itself admits that "[t]here do not appear to be any hard data available concerning the actual number of high-capacity business lines provided by cable operators."[23] As the Commission has recognized, cable infrastructure is not widely deployed to business customers.[24] The *Triennial Review Remand Order* also acknowledged what Qwest fails to address in its petition: that, "where cable companies do provide service to business customers,

[21] *See, e.g.,* August 12, 2005 Cox ex parte (noting that Cox relies on Section 251(c) interconnection, collocation, unbundled mass market loops, good faith negotiation, and network change notifications). http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518147928. In addition, it is noteworthy that Qwest heavily relies upon the existence of UNE-P based competition. Of course, UNE-P is in the process of being phased out, and the vibrancy of retail competition in the absence of UNE-P has yet to be established.

[22] *See* http://www.qwest.com/wholesale/clecs/sgatswireline.html#nonimp.

[23] *Id.* n. 509.

[24] *See* TRRO ¶¶ 39, 193.

they provide cable modem service, rather than service that is comparable to service provided over high-capacity loops."[25]

Even for residential or mass market customers, cable companies generally rely on bundled service offerings. Such bundled offerings drive up overall consumer costs. As the Commission found in the *Triennial Review Order*, existing intermodal competition does not warrant reversal of mass market impairment findings with respect to copper loop facilities.[26] Similarly, the Commission found that CLECs were not impaired in addressing the mass market for broadband services in the absence of access to a copper loop line sharing UNE *because they would have continuing access to UNE copper loops to provide the full suite of data and voice services.*[27] Again, removal of access to UNE loops based solely on the presence of existing retail competition would unravel the basis for this Commission determination as well, with unknown but surely deleterious effects on current and future competition.

The Commission's recent forbearance determinations regarding broadband unbundling do not provide meaningful support to Qwest's petition. More specifically, in recently deregulating new fiber and fiber-to-the-curb, the Commission's overriding objective was to spur ILEC investment in broadband facilities.[28] Given the Commission's unbundling "relief" provided to these new ILEC fiber facilities, elimination of remaining section 251 and 271 requirements on exclusively legacy facilities such as those requested by Qwest provides no corresponding benefit to facilities investment. Again, as discussed below, granting Qwest's petition would affirmatively *harm* CLEC incentives to invest, producing a net loss in investment and competition.

In short, Qwest's petition simply fails to provide data sufficient for the Commission to complete the necessarily rigorous analysis of all markets affected by forbearance from application of section 251 and 271 obligations in Omaha. The level of retail competition in Omaha is relevant *at most* to the direct regulation of retail offerings. The Commission can address this, if it feels compelled to do so, by a limited finding of non-dominance.[29]

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[25] *Id.* ¶ 193.

[26] *See* TRO ¶¶ 245-46 (finding that neither cable nor wireless is a full substitute to wireline telephony).

[27] *See Id.* ¶ 199,

[28] *See* TRO ¶ 290; FTTC Reconsideration Order ¶ 13.

[29] Even then, it is procedurally inappropriate for Qwest to include a request for a finding of non-dominance or that it is not an ILEC with a request for forbearance. *See* 47 C.F.R. §§ 1.44, 1.53.

Granting Qwest's petition would stifle competitive investment.

As predicted in the *Triennial Review Order*, granting Qwest's petition would inevitably have the circular effect of undermining competition and related investment in competitive facilities in Omaha. Granting Qwest's petition with regard to UNE access will create new uncertainties, and its results will be felt well beyond Omaha, Nebraska.

The Commission has repeatedly acknowledged the importance of encouraging investment in facilities by *all* industry participants.[30] Consistent with this goal, competitive carriers have invested billions of dollars in facilities, relying on access to a limited number of UNEs and, in many cases, deploying networks consisting entirely of self-owned facilities save for last-mile loops and collocation facilities housing CLEC-owned equipment. As a result of the relative stability created by the Commission's recent regulatory determinations, several CLECs have been able to restart the processes of raising capital to increase service and network roll-outs.[31] Granting Qwest the forbearance it seeks will stifle such investment and undo the significant competitive progress made by competitive intramodal service providers.

First, Qwest's petition sets forth no basis for concluding that competitive conditions in Omaha have eliminated impairment with respect to UNE loops, which CLECs use for last-mile connections between their own collocated equipment and business or consumer premises. [32] Thus, the Commission's clear findings in the *Triennial Review* proceedings that CLECs cannot sensibly duplicate these loops (except in limited circumstances) remains as true of Omaha as it is generally. Denial of access to UNE loops would thus inappropriately strand CLEC investment in central office equipment used to terminate loops. Aside from issues of reasonable reliance and fundamental fairness, regulatory decisions that strand existing

[30] *See, e.g.,* TRRO at ¶ 2 (adopting rules to help provide "the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition."). *See also* 47 U.S.C. § 157 nt.

[31] *See, e.g.,* New Edge (http://www.newedgenetworks.com/about/pressroom/news/?id=869) (raising $9 million in additional equity in January 2005); CBeyond (http://www.cbeyond.com/cbeyond/news-press-details.php?ID=44)(announcing Initial Public Offering in May 2005), http://www.cbeyond.com/cbeyond/news-press-details.php?ID=36 (raising $17 million in additional equity)) Eschelon (http://www.eschelon.com/about_us/section_detail.aspx?itemID=6462&catID=220&SelectCatID=220&typeID=6 (raising $68.9 million in its August 2005 Initial Public Offering).

32 To the contrary, in Nebraska, Qwest has not claimed non-impairment for any of its high-capacity loop facilities, and has only designated one wire center in Omaha for purposes of related transport deregulation. *See* http://www.qwest.com/wholesale/clecs/sgatswireline.html#nonimp.

investment send an extraordinarily negative signal to investors and others who influence investment decisions. In this case, such a decision it would directly foreclose future investments in collocation-based facilities in Omaha by depriving CLECs of access to the legacy loops needed to complete connections to customers, long before alternative networks such as broadband wireless have any significant level of market coverage.

Second, establishing an ad hoc precedent that key UNE inputs needed to provide service will be withdrawn once a certain level of retail competition has developed creates an extraordinary and open-ended "cloud" over forward-looking investments. CLECs making investment decisions will have no reliable basis for predicting when some threshold level of retail competition (measured in terms of competitor market share or some other measure) will materialize in a given market. CLECs will know one thing, however: if they invest in collocation based facilities as envisioned by the Act and ultimately succeed in the marketplace, their "reward" will ultimately be loss of access to very inputs needed to recoup their investments. As Qwest puts it in its petition, the growth of CLEC competition in Omaha "demonstrates that the Omaha MSA has no legal or economic barriers to entry," and thus Qwest proposes that the Commission immediately erect both types of barriers by eliminating section 251 in the entire MSA.[33] Section 10 of the Act cannot rationally be interpreted to create a game that is rigged from the outset against CLECs who rely upon their unbundling rights under the Act to provide competitive services. Rather, the Commission can and must adopt a rational approach that balances reasonable protection of CLEC investment incentives with other goals of Section 10. Ad hoc forbearance from unbundling requirements is not it.

Finally, grant of Qwest's petition will certainly lead to a flood of similar ILEC forbearance requests, possibly with even more granular geographic market designations. Opening these floodgates will be administratively burdensome for the Commission and the industry and will lead to significant additional regulatory uncertainty when stability is what is needed most.

<u>Significant unbundling decisions should not be made in forbearance proceedings</u>.

Instead of making unbundling determinations in the context of ad hoc forbearance proceedings, any Commission determinations regarding unbundling should be made within the confines of the established Triennial Review proceedings. Further, the major policy decisions requested by Qwest should certainly not be made on the limited record currently before the Commission. For instance, it is clear that competitive circumstances have changed dramatically since

[33] Qwest Forbearance Petition at 3.

the comment cycle on Qwest's petition. Notably, since Qwest's petition was filed, the Commission decided to phase out UNE-P.[34] Granting Qwest's requests would be premature at this point since this decision has not yet been fully implemented, and the full competitive effect of the UNE-P phase out has not been determined. Further, the elimination of UNE-P was based on the Commission's determination that the availability of access to UNE loops alleviated impairment otherwise suffered by intramodal competitors.[35] Grant of Qwest's petition with regard to UNE loops, based solely on the level of retail competition, would negate the basis for this prior decision and be flatly inconsistent. Instead, Qwest's Section 251 request should be considered by the Commission in a broader proceeding in due course given the impact of the potential deregulation on competition and prior Commission precedent.

It is also impossible for Qwest to make the compelling showing required to warrant the forbearance it seeks because its request is also premature in light of other pending matters. More specifically, the Commission has not yet clarified the classification and regulatory status of Internet telephony services.[36] Until this is clarified, Qwest's allegations of competition from IP telephony providers cannot prevail because it is unclear whether such services are meaningful substitutes for wireline telephony services. Also, Qwest's Section 272 sunset is not scheduled to occur until December 2005. Until such time, at the earliest, Qwest cannot avail itself to forbearance due to the Section 10 (d) prohibition on forbearance until such time as the Commission determines that Section 251(c) and 271 requirements have been "fully implemented."[37]

<u>Qwest cannot satisfy the three statutory prongs of the forbearance test.</u>

These severe factual deficiencies in the record make clear that Qwest has failed to satisfy its evidentiary burden in support of forbearance. Under section 10(a), the proponent of forbearance must make three "conjunctive" showings, and the Commission must "deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied."[38] First, Qwest must prove that enforcement of the

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[34] *See* TRRO ¶226.

[35] Although Qwest eagerly cites USTA I's vacation of the Commission's *Line Sharing Order* for the proposition that intermodal competition should be considered, *see* Qwest Petition at 25, it fails to note that the Line Sharing Order and the decision to eliminate UNE-P was based primarily on the availability of UNE loops. *See, e.g.,* TRRO at ¶¶ 208-09 (relying on successful deployment of UNE-L as a rationale for the elimination of UNE-P); *Line Sharing Order* ¶34 (justifying elimination of line sharing on the availability of unbundled loops).

[36] *See* IP-Enabled Services NPRM.

[37] *See* Opposition of CompTel/ASCENT (Aug. 24, 2004) at 5-8.

[38] Cellular Telecommunications & Internet Assn. v. FCC, 330 F.3d 502, 509 (D.C. Cir. 2003).

specific regulations that apply "telecommunications service" at issue "is not necessary to ensure that the charges, practices, classifications, or regulations . . . in connection with that . . . telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory."[39] Qwest has failed to demonstrate that, for each relevant product (in this case, each UNE, interconnection, or collocation input into retail services offered by Qwest's competitors) that there is an alternative to access to Qwest's network. As such, Qwest cannot demonstrate that the charges and practices related to such wholesale inputs would be available in a just and reasonable manner to competitors – indeed, Qwest cannot demonstrate that they would be available at all.

Second, Qwest must show that enforcement of those regulations "is not necessary for the protection of consumers."[40] Again, as demonstrated above, Qwest cannot point to any evidence that, absent UNEs, interconnection, and collocation, consumers would have *any* access to telecommunications services provided by any entity other than Qwest. Thus, Qwest cannot successfully argue that consumers would not be harmed by the elimination of such critical inputs.[41] In its forbearance petition, Qwest argues it is "no longer the dominant carrier in the Omaha MSA telecommunications market, and that Qwest no longer enjoys market power in the Omaha MSA."[42] Qwest's claim is based solely on the existence of limited retail competition for Qwest's own end user services. While retail competition may reduce Qwest's ability to raise retail prices above competitive levels, or to restrict its output for retail services, it will not constrain Qwest's anticompetitive behavior in the wholesale market for UNEs, where overwhelming evidence on the record in the instant proceeding confirms that Qwest is the sole supplier.

Third, Qwest must show that elimination of those regulations "is consistent with the public interest," and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[43] Because Qwest's forbearance request

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[39] 47 U.S.C. § 160(a)(l).

[40] 47 U.S.C. § 160(a)(2).

[41] In its forbearance petition, Qwest makes the blanket statement that there are no barriers to entry in the Omaha MSA because "[c]ompetitive providers have other market entry options in those areas where they choose not to deploy facilities" and that it "is no longer the exclusive source of switching and local loop facilities in the Omaha MSA." Qwest Forbearance Petition at 14, 17. Qwest does not identify those alleged alternative market entry options for CLECs in Omaha, nor does it give any examples of alternative wholesale loop facilities available to CLECs in Omaha.

[42] Qwest Forbearance Petition at 5.

[43] 47 U.S.C. § 160(a)(3).

would result in the complete elimination of competitive entry in Omaha, Qwest clearly cannot satisfy this prong of the forbearance test. Moreover, beyond seeking relief in the "Omaha MSA," Qwest does not define the relevant market for purposes of this prong of the forbearance test. As the Commission is well aware, the definition of the relevant market is a lynchpin of antitrust market analysis of the type Qwest proposes here. For example, in a joint petition for approval of their merger, Cingular Wireless and AT&T Wireless claimed that a "nationwide geographic market, rather than a set of local markets, is appropriate for assessing the effects of [the] transaction."[44] The Commission rejected the parties' proposed geographic market definition, concluding that the nature of wireless consumer offerings suggested a local geographic market definition was more appropriate for analysis of the potential anticompetitive impact of the proposed combination.[45] Similarly here, in order to determine whether, pursuant to Qwest's proposed forbearance test, the ability of the ILEC monopolist to impose a small, non-transitory price increase without losing market share (in other words, maintaining profitability) depends on the Commission's definition of the relevant geographic market.[46] Where a new entrant seeks to offer service to a customer via an unbundled loop, and the Commission is considering eliminating access to that unbundled loop, the relevant geographic market is not the entire Omaha MSA – it is the geographic parameters of alternatives to the loop serving that specific customer. Unless Qwest can prove that, within the defined geographic market the elimination of loop access would "promote competitive market conditions," Qwest is not entitled to forbearance.

Not surprisingly, Qwest also proposes no product market limits on the unbundling relief that would flow "automatically" from a demonstration of some

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[44] In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For
Consent to Transfer Control of Licenses and Authorizations, File Nos. 0001656065, et al., and Applications
of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation For Consent to
Assignment and Long-Term De Facto Lease of Licenses, File Nos. 0001771442, 0001757186, and 0001757204, and Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses, File Nos. 0001808915,
0001810164, 0001810683, and 50013CWAA04, WT Docket Nos. 04-70, 04-254, and 04-323, at ¶ 83 (rel.
Oct. 26, 2004).

[45] *Id.* at ¶ 87 ("[W]e reject the Applicants' suggestion of a national geographic market..").

[46] The Commission's analysis would necessarily examine whether a consumer, faced with such a price
increase from Qwest, could find another service provider willing to offer an identical substitute offering for
a lower price than offered by Qwest.

level of retail competition in the geographic market. For purposes of the Commission's analysis of Qwest's proposal, definition of the appropriate product market is as vital as a carefully constructed geographic market definition.[47] Thus, rather than suggesting an analysis of the relevant product market – that is, whether retail competition in a specific, defined product market has reached a level such that unbundled network elements used to provide those specific retail services, or their substitutable analogues, should no longer be available to requesting carriers – Qwest proposes that all unbundling, regardless of product market, would be eliminated. This is clear nonsense, as the Commission would have to, at a minimum, analyze whether the retail products that the ILEC claims are robustly competitive are reasonably interchangeable by consumers for the all other retail products offered by competitive carriers using unbundled network elements. Put another way, the Commission must conclude that, in the eyes of the consumer, the retail product that Qwest claims is competitive is a substitute for all other retail products that will no longer be available as a result of the total elimination of UNEs in the geographic market.

*   *   *

Grant of the forbearance from section 251 and 271 obligations requested by Qwest would be the wrong decision in the wrong proceeding. If any relief is to be granted to Qwest based upon the level of retail competition in Omaha, it should be confined to relief from regulation of its retail offerings only.

Respectfully submitted,

/s/ Jason Oxman

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[47] A relevant product market is the smallest group of competing products or services for which a hypothetical monopolist in a geographic area could profitably impose at least a "small but significant and non-transitory price increase," presuming no change in the terms of sale of other products. See DOJ/FTC Merger Guidelines at §§ 1.11, 1.12. This test is commonly referred to as the "hypothetical monopolist test."

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